Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems	)	CC Docket No. 94-102
	)	
Petition of City of Richardson, Texas	)	

To: The Commission

PETITION FOR RECONSIDERATION

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SUMMARY

Cingular Wireless LLC ("Cingular") hereby requests that the Commission revisit its *Order on Reconsideration.* The changes to Section 20.18(j) that were adopted in the *City of Richardson Order* (*Richardson I*) and *Order on Reconsideration* (*Richardson II*) violate the Administrative Procedure Act ("APA"), and contradict the Commission's long-standing policies regarding expediting E911 deployment. Cingular urges the Commission to vacate *Richardson I* and *II* and adopt a new Order (1) reaffirming that PSAPs must be ready to receive and utilize Phase II information prior to requesting service; (2) requiring PSAPs to submit readiness documentation with Phase II requests; (3) clarifying that the six-month period for responding to a PSAP request is tolled where a PSAP's readiness is challenged; and (4) establishing an expedited process for resolving disputes relating to readiness.

Section 20.18(j) states that wireless carriers must deploy Phase II service to any PSAP that "*is capable*" of utilizing the information at the time of its request. This requirement was adopted to expedite Phase II deployment by ensuring that carriers could focus their efforts on PSAPs that were actually ready to receive and utilize Phase II information. *Richardson I* effectively modified the "is capable" requirement so that a PSAP need only demonstrate that it *may be capable* of using the information within six months. *Richardson II* further eroded the rule by requiring carriers to deploy Phase II service to PSAPs even if they will be *unable* to utilize the information within six months. As a result of these changes, Section 20.18(j) is internally inconsistent and does not adhere to its stated basis and purpose, as required by the APA and case law. The "is capable" clause contained in Section 20.18(j) was adopted to ensure that a wireless carrier's Phase II obligation "*is not triggered until the actual time at which the PSAP can take advantage of the E911 service.*" Under the current rules, however, the deployment obligation is triggered if the PSAP *expects* to be capable of utilizing the information in six months, and this obligation continues even if it is demonstrated that the PSAP *will not be capable* of utilizing the information. Thus, the Commission has effectively converted "is capable" to "will not be capable" in terms of a carrier's Phase II deployment obligation. This inconsistency constitutes error.

The Commission's failure to issue a notice of proposed rulemaking prior to adopting the *Richardson I* and *II* changes also violates the APA. Although the Commission maintained that the changes to Section 20.18(j) constitute a "logical outgrowth" of earlier proposals identified in the proceeding, and that any error committed was harmless because interested parties received actual notice that a rule change was contemplated, similar justifications were repudiated in *Sprint v. FCC.* The Commission should reconsider its decision in light of this recent court opinion.

Moreover, the certification process adopted by the Commission in *Richardson II* is inconsistent with the Phase II rules and exacerbates PSAP readiness issues. Carriers now must "complete[] all necessary steps toward E911 implementation that are not dependent on PSAP readiness" *even where it is clear that a PSAP will not be capable of utilizing the information.* This requirement has severely impeded Cingular's ability to prioritize deployment. It is Cingular's experience that approximately one-third of PSAPs submitting requests for Phase II service are not capable of utilizing the information six months after the request. Thus, time and resources are diverted to fulfilling requests of PSAPs that in the end are not capable of utilizing the information, while PSAPs that are capable experience unnecessary delays.

Finally, *Richardson II* was issued as the result of petitions for reconsideration urging the Commission to adopt an expedited dispute resolution process. This decision, however, ignores this matter. Cingular urges the Commission to address this issue and adopt an expedited procedure for carriers and PSAPs to resolve disputes. Cingular also urges the Commission to specify that the six-month period for responding to valid PSAP requests be tolled during readiness disputes.

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PETITION FOR RECONSIDERATION

Cingular Wireless LLC ("Cingular"), on behalf of its subsidiaries and affiliates, hereby requests that the Commission revisit its *Order on Reconsideration.*[1] Section 20.18(j) states that wireless carriers must deploy Phase II E911 service to any PSAP that "*is capable*" of utilizing the information at the time of its request. This requirement was adopted to expedite Phase II deployment by ensuring that carriers could focus deployment efforts on PSAPs that are actually ready to receive and utilize Phase II information.[2] *Richardson I* modified this requirement so

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[1] *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Petition of City of Richardson, Texas,* CC Docket No. 94-102, *Order on Reconsideration*, FCC 02-318 (rel. Nov. 26, 2002) ("*Richardson II*"); *see also Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Petition of City of Richardson, Texas,* CC Docket No. 94-102, *Order*, 16 F.C.C.R. 18982 (2001) ("*Richardson I*").

[2] *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 18676, 18711 (1996); *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Second Memorandum Opinion and Order,* 14 F.C.C.R. 20850, 20879 (1999) (supplemental final regulatory flexibility analysis), *recon. denied,* 15 F.C.C.R. 22810 (2000), *affirmed sub*
(continued on next page)

that a PSAP need only demonstrate that it *may be capable* of utilizing the information within six months.[3] *Richardson II* further eroded the rule by requiring carriers to deploy Phase II services to PSAPs that will be unable to utilize the information within six months.[4] These substantive changes were made without adequate notice under the Administrative Procedure Act ("APA"), and created an internal conflict between the rule and its stated basis – to prevent wireless carriers from expending resources for E911 implementation before a PSAP is actually able to use the information. Cingular urges the Commission to vacate these rule changes and proceed in a manner that is consistent with the basis of the rule.

BACKGROUND

The Phase II E911 rules state that a wireless carrier must begin Phase II E911 deployment only after receiving a request from a PSAP that "*is capable* of receiving and utilizing the data elements associated with the service."[5] At the time of adoption and in subsequent decisions, the Commission expressly stated that the purpose of this condition was to ensure that a carrier's E911 obligations were not triggered until "a PSAP . . . *has made the investment which is necessary to allow it to receive and utilize the data elements associated with the service.*"[6] The requirement was designed to allow carriers to "avoid[] unnecessary expenditures or investments in their networks,"[7] thus speeding deployment of E911 by targeting

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nom., United States Cellular Corp. v. FCC, 2001 U.S. App. LEXIS 15395 (D.C. Cir. June 29, 2001) ("*Second Reconsideration Order*").

[3] *Richardson I*, 16 F.C.C.R. at 18982.

[4] *Richardson II* at ¶ 15.

[5] 47 C.F.R. § 20.18(j) (emphasis added).

[6] *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 18676, 18711 (1996).

[7] *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Second Memorandum Opinion and Order*, 14 F.C.C.R. 20850, 20909 (1999) (supplemental final regulatory flexibility analysis), *recon.*

(continued on next page)

carrier resources where PSAPs were truly ready. The Commission further explained that "the public, the PSAP and the carrier benefit from *a requirement that is not triggered until the actual time at which the PSAP can take advantage of the E911 service.*"[8] Thus, the FCC clarified that "is capable" means "is able."

Despite the clarity of the "is capable" language, the City of Richardson ("Richardson") requested that the Commission issue a declaratory ruling or clarification that the "is capable" component of the rules required wireless carriers to begin Phase II deployment if a PSAP merely (1) requested service and (2) stated that it would be ready for the service within six months.[9] The Wireless Telecommunications Bureau ("Bureau") issued two notices requesting comment on the need to clarify the "is capable" component.[10] Neither notice proposed a substantive change to the rules. Cingular opposed the clarification as unnecessary and noted that Richardson's proposal was inconsistent with the language of the rule and its basis.[11] Cingular also noted that the Bureau lacked the authority to propose substantive alterations to the Commission's rules.[12]

Nevertheless, substantive revisions were made to the Commission's rules as a result of the Bureau's notice.[13] Although the Commission retained both the "is capable" language and the

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denied, 15 F.C.C.R. 22810 (2000), *affirmed sub nom., United States Cellular Corp. v. FCC,* 2001 U.S. App. LEXIS 15395 (D.C. Cir. June 29, 2001) ("*Second Reconsideration Order*").

[8] *Second Reconsideration Order*, 14 F.C.C.R. at 20879 (emphasis added).

[9] City of Richardson Petition for Declaratory Ruling and/or Clarification, CC Docket No. 94-102 (Apr. 5, 2001).

[10] *Wireless Telecommunications Bureau Seeks Comment on Request for Clarification or Declaratory Ruling Concerning Public Safety Answering Point Requests for Phase II Enhanced 911*, CC Docket No. 94-102, *Public Notice*, DA 01-886 (Apr. 5, 2001); *Wireless Telecommunications Bureau Seeks Further Comment on The Commission's Rules Concerning Public Safety Answering Point Requests for Phase II Enhanced 911*, CC Docket No. 94-102, *Public Notice*, DA 01-1623 (July 10, 2001) ("*Richardson I Public Notice*").

[11] Cingular Wireless LLC, Comments, filed July 25, 2001, at 5-9.

[12] *Id.* at 8.

[13] *Richardson I*, 16 F.C.C.R. at 18982.

underlying purpose of the rule – to prevent wireless carriers from expending resources for E911 implementation before a PSAP is actually able to use the information – it added language that allows a PSAP to request Phase II service if it *may be* capable of utilizing the information in six months.

Because this language effected a dramatic change in Phase II deployment obligations, was made without the benefit of a notice of proposed rulemaking, and put the rule at odds with its stated purpose, Cingular sought reconsideration.[14] Cingular stressed that the new language would actually delay Phase II deployment because the new rules placed priority on the date of a request for Phase II service, rather than on the PSAP's ability to use and process Phase II data. Absent reconsideration, Cingular noted that carriers would be forced to deploy Phase II services to PSAPs that were unable to utilize them, and postpone deployment to PSAPs that were actually ready for the service.[15]

In addition to arguing for reconsideration, Cingular urged the Commission to adopt a tolling process that would allow carriers to prioritize Phase II deployment based on readiness. Under this proposal, carriers would be permitted to request documentation from a PSAP demonstrating that the PSAP was ready to use the information prior to requesting Phase II service.[16] If a PSAP produced adequate documentation, the carrier would be required to proceed with deployment. If the carrier deemed the documentation inadequate, it could cease deployment. Cingular noted that the Commission retained the authority to hold carriers

[14] Cingular Wireless LLC, Petition for Reconsideration, filed December 3, 2001 ("Petition").

[15] *Id.* at 12-13. Specifically, carriers would be forced to prioritize requests based on the date received, rather than *actual* readiness.

[16] *Id.*

accountable if the dispute was frivolous.[17] The Commission also retained the authority, if the filing were deemed frivolous, to require the carrier to complete deployment within six months of the date the request was originally submitted.

Second, the proposal permitted carriers to cease deployment efforts if there was a dispute over PSAP readiness.[18] In these instances, carriers would be permitted to shift deployment efforts to PSAPs that were clearly able to receive and utilize Phase II data. Again, however, the carrier assumed the risk that it would be held liable for failing to complete deployment within six months of the original request if the Commission determined that the dispute was frivolous (*i.e.*, the PSAP was ready at the time the request was submitted). To ensure that carriers had time to satisfy such requests, Cingular urged the Commission to adopt an expedited dispute resolution process.[19] Under Cingular's approach, carriers (1) would not be required to expend resources needlessly and (2) would be able to deploy Phase II services rapidly to PSAPs that are able to utilize the information.

On reconsideration, the Commission rejected Cingular's legal arguments concerning the requirements of the APA and failed to adopt Cingular's tolling process.[20] Instead, the Commission adopted a two-step tolling process that is unworkable and inconsistent with the basis of Section 20.18. Under *Richardson II*, a carrier is permitted to request documentation that the PSAP will be ready for Phase II services within six months – rather than ready for Phase II data on the date the request is made. This documentation request (Step One) must be made within 15 days of the PSAP request for Phase II and the PSAP must respond within 15 days.

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[17] Cingular Wireless LLC, Reply Comments Regarding Petition, filed January 28, 2002, at 12-13.

[18] Petition at 14.

[19] *Id.*

[20] *Richardson II* at ¶ 30-33. The Commission never addressed, however, Cingular's argument that the new rule was inconsistent with its stated basis.

Only if the PSAP fails to supply documentation may the carrier shift resources to other PSAPs.[21] Once this documentation step is completed, the carrier must continue with deployment *regardless of the PSAPs ability to utilize the information.*

If the carrier subsequently determines that a PSAP will be unable to use Phase II information, the Commission's "tolling" procedure permits the carrier to file a certification that the PSAP will not be ready (Step Two). The tolling only applies if the carrier (i) completes all Phase II deployment that does not require PSAP participation, (ii) notifies the PSAP of the proposed certification 21 days prior to filing and (iii) the PSAP does not object. As a result, carriers must move forward with deployment even where PSAPs will be unable to utilize the Phase II information. The adoption of this tolling process violated the APA.

DISCUSSION

I. SECTION 20.18(j) IS INTERNALLY INCONSISTENT AND DOES NOT ADHERE TO ITS STATED BASIS AND PURPOSE

Courts have long recognized that any judicial review of administrative action cannot be meaningfully conducted unless the court is fully informed of the basis for that action.[22] Accordingly, the "basis and purpose" statement required by Section 553(c) of the APA must "be sufficiently detailed and informative to allow a searching judicial scrutiny of how and why the regulations were actually adopted."[23] If the announced basis and purpose is inconsistent with the rule, or the rule itself is internally inconsistent, there is no "rational connection between the facts

[21] The Commission failed to toll the carrier's Phase II obligations where there is a dispute over the adequacy of the documentation.

[22] *See, e.g., P.A.M. News Corp. v. Hardin*, 440 F.2d 255, 259 n.6 (D.C. Cir. 1971).

[23] *Amoco Oil Co. v. EPA*, 501 F.2d 722, 739 (D.C. Cir. 1974).

found and the choice made" and the rule is therefore invalid.[24] These principles were not followed in *Richardson I* or *Richardson II*.

The Commission cloaked its actions here as a clarification, but none was needed. The original Bureau public notice conjured up an ambiguity even though none existed. The "is capable" language is clear on its face and was explained many times – a PSAP must be able to process E911 information before it can require a carrier to provide Phase II service. This requirement was consistent with the rule's original basis and purpose – to ensure that wireless carriers are not required to expend limited resources deploying E911 services until PSAPs are actually ready to use them.

In *Richardson I*, the Commission retained the original "is capable" language and basis and purpose, but revised the rules so that the PSAP is deemed capable merely if it can demonstrate that it should be ready within six months. Under Richardson *II*, wireless carriers must deploy Phase II service even if it is clear that the PSAP *will not be capable* of receiving the information. In these circumstances, wireless carriers must "complete[] all necessary steps toward E911 implementation that are not dependent on PSAP readiness"[25] whether or not the PSAP is ready to utilize Phase II information. Thus, even though the basis for the rule has remained unchanged, the deployment obligations of carriers have evolved as follows:

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[24] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), *quoting Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (vacating rulemaking order based on agency failure to address facts relevant to the rule adopted); *Chemical Mfrs. Ass'n v. EPA*, 28 F.3d 1259, 1267-68 (D.C. Cir. 1994) (vacating portion of rule as inconsistent with stated purpose); *Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752 (6th Cir. 1995).

[25] *Richardson II* at ¶ 15.

	Deployment Obligation
Original Rule	Carrier must deploy Phase II only after receiving a request for Phase II service from a PSAP *ready to use the information* on the date of the request
Richardson I	Carrier must deploy Phase II only after receiving a request for Phase II service from a PSAP that *might be able to use the information six months after making a request*
Richardson II	Carrier must move forward with Phase II deployment *even after it is established that the PSAP will be unable to use the information within six months of its request*

The changes adopted in *Richardson I* and *Richardson II* make the rule internally inconsistent and undermine the rule's objective. As stated above, the "is capable" clause contained in Section 20.18(j) was adopted to ensure that a wireless carrier's Phase II obligation "*is not triggered until the actual time at which* the *PSAP can take advantage of the E911 service.*"[26] Under the current rules, however, the deployment obligation is triggered if the PSAP expects to be capable of utilizing the information in six months, and this obligation continues even if it is demonstrated that the PSAP *will not be capable* of utilizing the information. Thus, the Commission has converted "is capable" to "will not be capable" in terms of a carrier's Phase II deployment obligation. This inconsistency constitutes error.[27]

Although the *Richardson I* modifications purportedly were designed to maintain the original protection afforded wireless carriers against the needless expenditure of limited resources to satisfy E911 requests,[28] they effectively changed the rule and eliminated this protection. Worse, the *Richardson II* modifications require carriers to continue with Phase II

[26] *Second Reconsideration Order*, 14 F.C.C.R. at 20879 (emphasis added).

[27] *See Chemical Mfrs.*, 28 F.3d at 1267-68 (vacating inconsistent portion of a rule).

[28] *Richardson I*, 16 F.C.C.R. at 18985, 18986.

deployment even where a PSAP cannot use the information. The original rule, however, provided absolute protection – carriers had no obligation to expend resources until a PSAP was able to use the requested E911 information. Thus, the rule is now at odds with its stated basis because wireless carriers must expend resources to supply Phase II information to PSAPs that are not capable of using it.

Accordingly, the *Richardson I* and *Richardson II* rule changes must be vacated.

II. THE AMENDMENT OF SECTION 20.18(J) VIOLATED THE APA AND THE COMMISSION'S RULES

A. The Commission's Failure to Issue an NPRM Was Fatal

Section 553(b) of the APA generally requires notice and an opportunity to comment before the promulgation or amendment of a substantive agency rule.[29] A rule is considered substantive if it "repudiates or is irreconcilable with" a prior legislative rule.[30] The APA requires that a rulemaking notice include, among other things, "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[31] The APA also stipulates that, "after consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."[32]

Based on these requirements, the Commission was required to issue notices of proposed rulemakings before adopting its *Richardson I* and *II* changes. These changes were substantive and fundamentally altered the deployment obligations of wireless carriers. Initially, carriers' E911 obligations were triggered *only* when the requesting PSAP was actually able to use the

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[29] 5 U.S.C. §553(b); *see National Exchange Carrier Ass'n, Inc.*, ASD 98-96, *Order*, 15 F.C.C.R. 1819, ¶6 (1999) (noting that "[u]nder the APA, a substantive rule is invalid if not promulgated in accordance with proper notice and comment requirements").

[30] *Nat'l Family Planning v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992).

[31] 5 U.S.C. §553(b).

[32] 5 U.S.C. §553(c).

Phase II information. Under *Richardson I*, carriers must deploy Phase II in response to requests from PSAPs that *might* be ready for the information in six months. *Richardson II*, in turn, now requires carriers to deploy even where it is established that the PSAP will be *unable* to utilize the information within six months of its request.[33] In effect, the Commission has *reversed* its initial E911 rules without acknowledging it. Yet, the Commission has never repudiated its prior finding that the public interest is best served by ensuring efficient utilization of carrier resources in order to speed Phase II deployment to those PSAPs that are able to use the information.[34]

As Cingular pointed out in its Petition, the *Richardson I Public Notice* issued by the Bureau did not, and could not, satisfy the notice requirements of the APA regarding substantive rule changes. First, the *Richardson I Public Notice* indicated that the *Bureau* was only considering *clarifying* the rule. It did not propose a substantive rule change, nor did the notice set forth the text of the proposed rule. Thus, interested parties were not provided the required notice of a substantive rule change.

Second, the APA requires the "agency" to issue notices of proposed rule changes and to publish such notices in the Federal Register.[35] This requirement was not satisfied because no notice of proposed rulemaking was issued for either *Richardson I* or *II*. Moreover, the Bureau, not the Commission, issued the *Richardson I Public Notice,*[36] and the Commission's rules

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[33] *Richardson II* at ¶ 15.

[34] *Second Reconsideration Order* at 20879.

[35] *See* 5 U.S.C. § 553(b).

[36] The Commission states that the Federal Register publication requirement was properly satisfied because the *Richardson I Public Notice* appeared in the Federal Register. *Richardson I,* 16 F.C.C.R. at 18989. This conclusion is flawed. As stated below, the *Richardson I Public Notice* did not propose a substantive rule change, so it could not satisfy the APA notice requirement. Second, there is no legal precedent for the conclusion that publication of a Bureau notice in the Federal Register converts the Bureau document into a document required to be issued by the Commission itself.

prohibit the Bureau from issuing notices of proposed rulemaking.[37] Thus, under the APA, a Bureau's public notice indicating that it was merely contemplating a rule clarification is not the same as a Commission notice of proposed rulemaking that seeks comment on a substantive rule change. The failure to comply with these requirements constitutes a violation of the APA and the Commission's rules.

B. The D.C. Circuit's Recent Decision in *Sprint v. FCC* Supports Cingular's Position That the Commission Violated the APA

In *Richardson II*, the Commission maintains that the modifications to Section 20.18(j) effectuated by *Richardson I* constitute a "logical outgrowth" of earlier proposals identified in the proceeding, and that any error committed was harmless because interested parties received actual notice that a rule change was contemplated.[38] Since the Commission released *Richardson II*, however, the D.C. Circuit released its decision in *Sprint v. FCC*,[39] which repudiates similar Commission arguments. This case bolsters Cingular's position that the recent modifications to Section 20.18(j) were adopted in violation of the APA.

In *Sprint v. FCC*, a coalition of payphone service providers ("Coalition") filed a petition asking the Commission to clarify its orders regarding payphone compensation.[40] In April 1999, the Common Carrier Bureau issued a Public Notice seeking "comment on the issues raised in the request for clarification."[41] The Bureau's Public Notice summarized the Coalition's request and

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[37] 47 C.F.R. § 0.331(d). This prohibition was modeled after the delegated authority provision for the Common Carrier Bureau, which expressly states that the bureau "shall not have authority to issue notices of proposed rulemaking." *See Amendment of Part 0 of the Commission's Rules to Reflect a Reorganization Establishing the Wireless Telecommunications Bureau and to Make Changes in the Delegated Authority of Other Bureaus*, 10 F.C.C.R. 12751 (1995); 47 C.F.R. § 0.291.

[38] *Richardson II* at ¶ 30-33.

[39] No. 01-1266, 2003 U.S. App. LEXIS 910 (D.C. Cir. Jan. 21, 2003).

[40] *Id.* at *6.

[41] *Id.* at *7.

its proposed clarification. The Commission subsequently revised the subject rules, adopting a proposal different from the one suggested by the Coalition.[42] Sprint objected, contending that the Commission erred in failing to issue a notice of proposed rulemaking prior to promulgating a new rule.[43] The Commission maintained that the rule revision was acceptable because: (1) it is permitted *sua sponte* to reconsider its rules where a reconsideration order is pending, as long as the original proposed rule supplied notice; (2) it was not required to issue a new notice of proposed rulemaking because its revisions constituted a "logical outgrowth" of the Bureau's notice; (3) interested parties had actual notice, so any notice deficiencies were cured; and (4) Sprint had failed to show that it was prejudiced by any deficiencies in the Commission's notice.[44]

The Court was unconvinced, holding that the Commission had failed to conform its conduct to the APA notice requirement.[45] Specifically, the Court found that the pendancy of petitions for reconsideration did not justify modifying the text of an existing rule. At best, the Commission might have been justified in setting aside the existing rule, or reinstating an older version of the rule.[46] The Court also found the Commission's "logical outgrowth" argument unavailing. According to the Court, "[i]n order for a final rule to be a 'logical outgrowth' of [a] proposal,. . . the agency first must have provided proper notice of the proposal."[47] The Court specifically found that the Bureau's action did not constitute adequate notice because the Bureau lacked the authority under the Commission's rules to issue notices of proposed rulemaking.[48] The Court further found that interested parties could not have received actual notice of the

[42] *Id.* at *8-9.
[43] *Id.* at *10.
[44] *Id.* at *14-21.
[45] *Id.* at *2.
[46] *Id.* at *15-17.
[47] *Id.* at *18.
[48] *Id.* at *19.

contemplated rule change because, as discussed above, the Bureau does not have authority to issue notices of proposed rule changes.[49] Finally, the Court found that Sprint was prejudiced by the Commission's failure to provide proper notice of the proposed rule changes. According to the Court, "[a]lthough a showing of actual prejudice is not required under the prejudicial error rule, Sprint has made a colorable claim that it would have more thoroughly presented its arguments had it known that the Commission was contemplating a rulemaking."[50]

As discussed above, the Commission advanced essentially the same arguments in *Richardson I* and *II* to justify its failure to adhere to the notice requirement of the APA. Those arguments fail in the E911 context, just as they failed in *Sprint v. FCC*. It is clear that the Commission cannot modify its rules without initiating a rulemaking proceeding.

The *Sprint* case also rebuts the Commission's application of the "logical outgrowth" theory. There can be no "logical outgrowth" of a proposal unless the agency provided proper notice in the first place. A Bureau-issued "Public Notice" cannot constitute proper *agency* notice of the proposed rule change, especially where, as here, the Bureau did not have authority under the agency's rules to issue such a notice. Insofar as the Bureau's notice was defective, under the *Sprint* analysis, Cingular could not have received "actual notice."

Like Sprint, Cingular was prejudiced by the Commission's failure to provide notice prior to amending Section 20.18(j). As discussed above, the changes adopted in *Richardson I* and *II* drastically alter wireless carriers' E911 deployment obligations. Cingular would have supplied more information regarding the costs and burdens associated with the Bureau's proposal if it had known that the Commission was proceeding directly to rules.

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[49] *Id.* at *20.

[50] *Id.* at *22.

Accordingly, the Commission must vacate the *Richardson I* and *II* rule changes based on the principles set forth in *Sprint v. FCC.*

III. THE CERTIFICATION PROCESS IS INCONSISTENT WITH THE PHASE II RULES AND EXACERBATES PSAP READINESS ISSUES

Rather than force carriers to expend resources deploying Phase II services to PSAPs that were not capable of receiving the information as required by *Richardson I*, Cingular urged the Commission to revert to its original rules that permitted carriers to prioritize deployment based on PSAP readiness instead of the date of a PSAP request.[51] Cingular also proposed that carriers be permitted to stop Phase II deployment where there was concern about a PSAP's readiness, which would allow carriers to shift deployment efforts to a PSAP that is able to receive and utilize Phase II data.

Instead of facilitating Phase II deployment, *Richardson II* adopted a tolling process that will exacerbate PSAP readiness issues and delay the deployment of Phase II services to PSAPs that are ready for the information. *Richardson II* prescribes a difficult course of conduct for carriers to escape liability for actions outside of their control – actions that carriers should not be responsible for under the plain language of the rules.

Under the *Richardson II* certification process, carriers are now required to continue deploying Phase II service *even where it is clear that a PSAP will not be capable of utilizing the information*. Under these circumstances, carriers must "complete[] all necessary steps toward E911 implementation that are not dependent on PSAP readiness." Because the carrier still must complete its portion of the deployment, it is difficult to understand how this provision "tolls" the carrier's deployment obligation.

[51] Petition at 1.

Prior to release of *Richardson I*, Cingular had established a method for prioritizing PSAP requests for Phase II service. When a request was received, Cingular made an initial readiness determination based on the information provided by the PSAP. If necessary, Cingular requested additional documentation to substantiate readiness. Once Cingular confirmed that the PSAP was capable of utilizing Phase II information, it prioritized the request based on the following factors: size of the PSAP/market, PSAP status with respect to Project Locate, and the date of the PSAP request. Using these factors, Cingular expected to maximize the speed and reach of its provision of Phase II service to wireless subscribers.

Based on the rule revisions, however, PSAP readiness is now irrelevant to Cingular's deployment. Carriers must commence Phase II deployment in response to requests from PSAPs who expect to be ready in six months and must continue deploying even when a PSAP acknowledges that it will not be ready in six months. This has severely impeded Cingular's ability to prioritize deployment.

Because E911 deployment is time intensive, Cingular now must commence deployment without any conviction that the PSAP will be able to utilize the information at the time Cingular completes its deployment. Time and resources are diverted to fulfilling requests of PSAPs that in the end are not capable of utilizing the information, and PSAPs that are capable experience unnecessary delays. In effect, PSAPs that are not ready may cut to the front of the line – to the detriment of other PSAPs and the public interest. It is Cingular's experience that approximately one-third of PSAPs submitting requests for Phase II service are not capable of utilizing the information six months after the request.

The certification process merely adds several unnecessary, procedural hurdles that a carrier must satisfy in order to escape liability for violating the Commission's rules. First and foremost, a carrier must complete all necessary steps toward E911 implementation that are not

dependent on PSAP readiness, and only *then* may the carrier file a certification with the Commission that the PSAP will not be capable of utilizing the Phase II information within six months of its request date.[52]

Second, as a prerequisite to filing the certification, the carrier must notify the PSAP of its intent no later than 21 days prior to the filing.[53] Within those 21 days, the PSAP may respond to the carrier's notification, and if the PSAP merely objects to the carrier's readiness determination, the carrier cannot avail itself of the certification process.[54] Thus, the rules effectively grant PSAPs veto power in the certification process.

Third, the 21 day prior notification requirement is unworkable. Carriers often need the full six months provided by the rules to complete their deployment obligations, including end-to-end testing with PSAPs. Thus, carriers often have not completed these obligations 21 days prior to the end of the six-month deployment period and cannot take advantage of the certification process.

Fourth, it is Cingular's experience that many PSAPs often believe until the last moment that they will be ready at the end of six months – yet approximately one-third of these PSAPs are *not* ready. When Cingular has approached these PSAPs regarding certification issues, they often refuse to acknowledge that they will not be ready.[55] Thus, Cingular is forced to continue to move forward with deployment even where there is concrete evidence that the PSAP will not be ready.

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[52] *Richardson II* at ¶ 15.

[53] *Id.* at ¶ 16.

[54] *Id.*

[55] Rather than inject a counter-productive certification request into the deployment process, Cingular would prefer to work with PSAPs in an attempt to complete deployment. If it does so, however, tolling will not apply.

Finally, the certification process is unnecessary given the Commission's determination that it would not hold carriers responsible for failing to deploy where PSAPs are unable to use Phase II data.[56] Thus, the Commission should eliminate the certification process and simply allow carriers to stop deploying Phase II to any PSAPs for which they have a good faith belief will not be ready to use the information. This would permit carriers to shift resources to PSAPs that are ready. Such a carrier would be immune from liability unless the PSAP can demonstrate that it was ready within six months of its request.

IV. THE RULES FAIL TO ADDRESS CARRIER E911 OBLIGATIONS WHERE THERE IS A DISPUTE BETWEEN THE PSAP AND THE CARRIER REGARDING READINESS

Although the subject orders have adopted detailed procedures governing various portions of the E911 implementation process, the Commission has left a sizable hole in the guidance provided: what are a carrier's deployment obligations where there is a dispute between the carrier and the PSAP concerning readiness? For example, what happens where the PSAP provides readiness documentation but the carrier believes it is insufficient? Because of the importance of E911 deployment, prompt Commission action on disputes is required. Accordingly, in its Petition, Cingular urged the Commission to adopt an expedited procedure whereby carriers and PSAPs could resolve disputes.

Cingular also urged the Commission to specify that the six-month period for responding to valid PSAP requests be tolled during readiness disputes.[57] Otherwise, carriers would be required to expend resources to satisfy an invalid request while the dispute is pending. E911

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[56] *Richardson II* at ¶ 14. Of course, the Commission was compelled to reach this conclusion. Otherwise, it would be holding carriers liable for actions wholly outside of their control.

[57] Petition at 14. Under *Richardson II*, tolling is only authorized where there is no dispute!

deployment is time intensive and the full six months is often necessary to meet PSAP requests. Thus, absent tolling, a carrier would be required to begin E911 deployment in response to a challenged request simply to ensure that deployment could be timely completed in the event the Commission rejected the challenge. Tolling the deployment period during dispute resolution is consistent with the purpose of the rule – to protect carriers from expending resources needlessly and to expedite Phase II availability.

Adoption of Cingular's proposal is consistent with the public interest because it would permit carriers to divert deployment efforts to PSAPs that are clearly ready for Phase II service, rather than wasting resources deploying the service in areas where it cannot be used. Cingular requests that the Commission adopt this proposal.

CONCLUSION

For the foregoing reasons, and as urged by Cingular in its Petition, the Commission should vacate *Richardson I* and *II* and adopt a new Order (1) reaffirming that PSAPs must be ready to receive and utilize Phase II information prior to requesting service; (2) requiring PSAPs to submit readiness documentation with Phase II requests; (3) clarifying that the six-month period for responding to a PSAP request is tolled where a PSAP's readiness is challenged; and (4) establishing an expedited process for resolving disputes relating to readiness. If the Commission declines to vacate *Richardson I* and *II*, it should allow carriers to stop deploying

Phase II to any PSAPs they believe will not be ready to use the information, and shift to the PSAP the burden of proving actual readiness at the end of six months.

Respectfully submitted,

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February 21, 2003

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